

Claimant argues the Board does not have jurisdiction, on an appeal from a preliminary hearing order, to address the issue of the ALJ's Order for medical treatment. Claimant further argues that she suffered a compensable injury and the ALJ's Order finding her claim compensable and awarding medical compensation should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant is employed as a telemarketer selling long distance and local service for respondent. On October 7, 2003, claimant was participating in a dance contest at work. While performing the twist, her left knee gave out and she fell hitting her head as well as her back on the floor. Claimant alleged injury to her left knee, head and back at that time.

The respondent encourages its employees to participate in various activities including but not limited to card games, karaoke, sack races, three-legged races, pie throwing and dance contests that are held during work hours several times a month. Such activities are promoted by respondent in order to boost morale and energize its employees. Employees who participate are eligible to win prizes ranging from television sets, vacations, cash and time off from work. The contests occur during scheduled work hours on respondent's premises but participation is voluntary. Some employees participate and some do not.

Respondent argues that claimant's accident occurred during a dance contest which was a recreational or social activity. Consequently, respondent argues K.S.A. 2003 Supp. 44-508(f) precludes a finding the accident arose out of and in the course of claimant's employment.

K.S.A. 2003 Supp. 44-508(f) provides:

The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

The ALJ concluded that the foregoing definition is inapplicable to the facts in this case. Initially, it should be noted that it is claimant's uncontradicted testimony that participation in the various contests was encouraged by respondent as an effort to energize, motivate and boost employee morale. This would benefit the employer by increased sales. Moreover, while participating in such activities the employees were on the respondent's premises during regularly scheduled work and were being paid.

2 Larson's Workers' Compensation Law, § 22.01 (2000) at 22-2, lists three factors to determine whether recreational and social activities fall within the course of an employee's employment.

One factor is whether the employer expressly or impliedly requires participation in the activity or brings the activity within the orbit of employment by making the activity part of the service of employment.

In this instance, the accident occurred while claimant was involved in an employer supervised contest and it took place during the normally scheduled work period on respondent's premises. Such activities occurred several times a month. Claimant received her normal compensation while she participated in the contest activities. And although not required, participation in the activity was encouraged and promoted by respondent to the extent that respondent provided prizes to the contest winners such as cash and time off from work. Although not required to participate, the employees were certainly provided significant incentives which impliedly encouraged participation. Moreover, the activities were performed on such a regular basis that they were a regular custom or practice and, as such, an incident of the employment to those who participated.

A second factor listed by *Larson's* in determining whether a recreational activity is within the course of employment is whether the employer derives a benefit from the employee's participation beyond the benefits of the employee's health and morale. In this case the activities were promoted by respondent, in part to motivate and energize the sales force. The intended benefit would be increased sales by that staff which directly benefitted respondent.

A final factor in determining whether recreational activities are within the course of employment is whether they occur on the employer's premises during a lunch or recreation period as a regular incident of the employment. According to *Larson's*, "recreational injuries during the noon hour on the premises have been held compensable in the majority of cases."¹ In this instance, claimant was not only on respondent's premises but also was on duty and being paid when the accident occurred. Moreover, claimant was engaged in an activity promoted by respondent and a regular incident of employment.

The Board concludes respondent's actions in promoting the various activities, whether denominated recreational or social, which took place during regular work hours and on the respondent's premises, extended the scope of employment to include participation in the activities. Consequently, the Board affirms the ALJ's determination claimant's injuries arose out of and in the course of her employment.

¹ *2 Larson's Workers' Compensation Law*, § 22.03 (2000) at 22-5.

Lastly, the Board notes that for supervisor's to encourage as well as observe employees participating in activities on the premises while being paid for the time spent engaging in the activities and then subsequently assert the social or recreational activity defense after an injury occurs is analogous to an employer relying upon a horseplay defense to a workers compensation claim where the employer is aware of the horseplay and has taken no action to prohibit such activity. In those instances, an employer is not allowed to condone, permit or even encourage prohibited activity and then use the prohibited activity as a defense to any subsequent claim.

The respondent next argues the award of medical compensation should be limited to claimant's left knee. The respondent argues the ALJ exceeded his jurisdiction authorizing medical treatment for more than claimant's left knee. Conversely, the claimant argues the Board does not have jurisdiction to address the issues raised by respondent regarding the ALJ's Order granting claimant medical treatment.

The Board agrees with the claimant and concludes, at this juncture of the proceeding, it does not have jurisdiction to review the ALJ's preliminary decision regarding medical compensation.

The Board's jurisdiction to review preliminary hearing issues and findings is generally limited to the following:

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of employment?
- (3) Did the worker provide timely notice and timely written claim?
- (4) Is there any defense to the compensability of the claim?²

Additionally, the Board may review any preliminary hearing order where a judge exceeds his or her jurisdiction.³ Jurisdiction is generally defined as authority to make inquiry and decision regarding a particular matter. The jurisdiction and authority of a court to enter upon inquiry and make a decision is not limited to deciding a case rightly but includes the power to decide it wrongly. The test of jurisdiction is not a correct decision but the right to enter upon inquiry and make a decision.⁴

² K.S.A. 44-534a(a)(2) (Furse 2000).

³ K.S.A. 2003 Supp. 44-551(b)(2)(A).

⁴ See *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683, P.2d 902 (1984).

The preliminary hearing statute found at K.S.A. 44-534a(a)(2) (Furse 2000) gives the ALJ authority to grant or deny the request for medical compensation pending a full hearing on the claim. Thus, the ALJ did not exceed his jurisdiction and the Board does not have jurisdiction to review the ALJ's preliminary hearing Order.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.⁵

WHEREFORE, it is the finding, of the Board that the Order of Administrative Law Judge Jon L. Frobish dated February 9, 2004, finding the claim compensable is affirmed and respondent's request for review of the award of medical compensation is dismissed.

IT IS SO ORDERED.

Dated this _____ day of April 2004.

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Kim R. Martens, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁵ K.S.A. 44-534a(a)(2) (Furse 2000).